Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1985

Harold Roberts, as Commissioner of Labor of the State of New York,

Appellant,

v.

Rotary Club of Duarte, Inc.,

Appellee.

Irene Grassey, *et al.*,

Appellants,

v.

Rotarians of Lynchburg, Inc.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE UNITED FARM WORKERS OF AMERICA; COMMITTEE OF INTERNS AND RESIDENTS; COMMUNICATIONS WORKERS OF AMERICA; DISTRICT ONE, INTERNATIONAL LADIES GARMENT WORKERS' UNION; UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA; LABOR EDUCATION AND RESEARCH PROJECT; AND NATIONAL CONFERENCE OF BLACK LAWYERS

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BRIEF AMICUS CURIAE

TABLE OF CONTENTS

	PAGE
Table of Contents.....	i
Table of Authorities.....	ii
INTEREST OF AMICI.....	1
INTRODUCTION	14
The Parties.....	16
The Procedural History.....	18
ARGUMENT.....	20
CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases:	PAGE
Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984).....	25,29
California Association of Hospitals, etc. v. Henning, ___ F.2d ___ (9th Cir. 1985), Civ. Nos. 83-6381, 83-6416 (9th Cir. Sept. 6, 1985)...	30
Callanan v. United States, 364 U.S. 587 (1961).....	26
Central States, Southeast and Southwest Areas Pension Fund, et al. v. Central Transport, ___ U.S. ___, 53 U.S.L.W. 4811 (June 19, 1985)...	23,24
Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982).....	20,28
E.E.O.C. v. Westinghouse, 725 F.2d 211 (3d Cir. 1983), cert. den'd, ___ U.S. ___, 105 S.Ct. 92 (1984)..	10,29
Equal Employment Opportunity Commission v. Westinghouse Electric Corporation, Civil Action #84-4799 (E.D. Pa).....	10
Gilbert v. Burlington Industries, 765 F.2d 320 (2d Cir. 1985).....	passim
Gilbert et al. v. Burlington Industries (S.Ct. Dkt. Nos. 85-441 and 85-460).....	passim

PAGE

Marcal Paper Mills, Inc. v. Ewing, Civ. Action No. 83-0274-B (D. Maine August 27, 1985)..... 29

McDougall v. Donovan, 552 F. Supp. 1206 (N.D. Ill. 1982)..... 21

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980)..... passim

Petrella v. NL Industries, Inc., 529 F. Supp. 1357 (D.N.J. 1982).... 26

Russell v. Massachusetts Mutual Life Ins. Co., 722 F.2d 482 (9th Cir. 1982), rev'd on other grds, ___ U.S. ___, 53 U.S.L.W. 4938 (June 25, 1985)..... 26

Scott v. Gulf Oil, 754 F.2d 1499 (9th Cir. 1985)..... 2,23, 29

Sedima, S.P.R.L. v. Imrex, et al., ___ U.S. ___, 53 U.S.L.W. 5034 (July 1, 1985)..... 27

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1982)..... 29

Slack v. Burlington Industries, ___ F.2d ___ (4th Cir. 1985), Civ. Nos. 84-2241 (L) and 84-2257 (4th Cir. September 3, 1985)..... 33

Smith v. CMTA-IAM Pension Trust, 746 F.2d 587 (9th Cir. 1984)..... 21

PAGE

STATUTES:

National Labor Relations Act,

29 U.S.C. § 152(5)..... 9

Employee Retirement Income Security Act of 1974:

29 U.S.C. § 1001, et. seq..... passim

29 U.S.C. § 1002(1)..... 24

29 U.S.C. § 1002(4)..... 9

Age Discrimination in Employment Act of 1967,

29 U.S.C. § 623(f)(2)..... 10

New York Labor Law § 198-c..... 19

OTHER AUTHORITIES:

H. R. Rep. No. 93-533, reprinted in 1974 U.S. Code Cong. & Admin. News (USCCANS), pp. 4643, 4650, 4651..... 26

H. R. Rep. No. 93-1280, reprinted in 1974 USCCANS, pp. 5076, 5164..... 27

Sen. Rep. No. 93-127, reprinted in 1975 USCCANS, pp. 4841, 4865, 4869, 4881, 4882..... 27

Sen. Rep. No. 93-383, reprinted in 1974 USCCANS, p. 4917..... 27

PAGE

Statement of Hon. Al Ullman, reprinted in 1974 USCCANS, 5171..... 27

Statement of Hon. Harrison A. Williams, Jr., reprinted in 1974 USCCANS, p. 5186..... 27

INTEREST OF AMICI

THE UNITED FARM WORKERS OF AMERICA, AFL-CIO ("UFW") is a labor organization which represents agricultural employees. Its membership fluctuates in size from season to season in a given year, but in the aggregate, it represents over 100,000 workers, most of whom live and work in the states of California, Arizona, Florida and Texas.

Farmworkers receive no protection under the National Labor Relations Act, and in most states, their employment relations are theoretically left to the vagaries of the free market. In practice, many growers receive both direct and indirect government assistance in various forms. To the extent employment contracts (oral or written) exist in farm labor, they are ordinarily enforceable by means of common law or statutory remedies in state courts. Hence, the UFW's interest in

the Gilbert v. Burlington case: decisions such as that of the Second Circuit Court of Appeals in Gilbert, and of the Ninth Circuit in Scott v. Gulf Oil, 754 F.2d 1499, threaten the viability of the only remedies available to many farmworkers. Such decisions create the tangible, poignant irony that a law (ERISA) designed to protect workers from abuses in the administration of funds from which they are to derive benefits, actually deprives workers of remedies previously available. The UFW therefore respectfully requests that it be permitted to join in the arguments of amici herein, and that this brief amicus curiae be accepted and considered by this honorable Court.

THE COMMITTEE OF INTERNS AND RESIDENTS ("CIR") is a labor union representing 5,000 salaried physicians in private and public hos-

pitals in New York and New Jersey who are not organized pursuant to the National Labor Relations Act.

The Committee of Interns and Residents seeks to join in the brief submitted by labor organizations as amicus curiae on behalf of appellants in this case because the issues raised in the appellants' jurisdictional statements and this Court's decision of those issues will have a substantial impact on the day-to-day operation of amicus and long term and profound implications for its operation generally.

Specifically, if an employer's simple promise or undertaking to pay benefits such as severance pay, sick pay, holiday or personal leave, is construed to constitute a "plan" with the meaning of ERISA and, therefore, to trigger pre-emption, amici will suffer or observe the following consequences: salaried physicians not protected by collective bar-

gaining agreements negotiated under the NLRA will lose the minimal protection of administrative and common-law remedies should employers default on promises to provide benefits. Faced with the threat of becoming dependent upon employer discretion and good will for such benefits, salaried physicians will be reluctant to exercise their right to organize into labor unions.

The Committee of Interns and Residents therefore seeks to join appellants in urging the Court to reverse the decision of the Court of Appeals and to obtain a ruling that a simple contractual promise to provide benefits such as severance pay does not constitute a plan within the meaning of ERISA so as to preempt the operation of state contractual or statutory law in this field.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, DISTRICT ONE ("CWA") is a labor union representing 125,000 workers in the private and public sectors in New York, New Jersey and the New England States.

Communications Workers of America, District One seeks to join in the brief submitted by labor organizations as amicus curiae on behalf of appellants in this case because this Court's decision of the issues they raise will have a profound impact on the constituency which the amicus seeks to serve.

CWA is specifically concerned about the effect of a ruling such as that of the Second Circuit on its ability to organize new members. The net effect of an expansive reading of the term "plan" is to reduce an employee's contractual right to a specific benefit to a right to engage in costly litigation under ERISA. Amici have found that decisions which tend to make benefits less secure have a chil-

ling effect on the exercise by workers of the right to associate with union organizers and others involved in the early stages of organizing.

It must be emphasized that the workers affected and disadvantaged by this interpretation are precisely those most in need of protection, particularly those not represented by labor unions and those whose continued employment is jeopardized by the actions of their employers.

Communications Workers of America, District One, therefore seeks to join in the petition before the Court to reverse the decision of the Court of Appeals and to obtain a ruling that a simple contractual promise to provide benefits such as severance pay does not constitute a plan within the meaning of ERISA so as to pre-empt the operation of state law in this field.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO ("ILGWU") is a labor union representing hundreds of thousands of workers in the apparel and clothing industries. These industries have long been characterized by sweatshops and worker exploitation. Employer avoidance of payment of severance, holiday, vacation, sick pay and the like is endemic to these industries. In recent years, high levels of imported garments made at rates of pay as low as $0.16 per hour have aggravated this serious problem.

ILGWU wishes to join in the amicus curiae briefs submitted by labor organizations and state attorneys general in support of the petition in this case because the issue presented for review has a significant effect on the wages and working conditions which prevail in the apparel and clothing industries. If state statutes which effectively enforce direct promises of employers to pay wage sup-

plements, such as severance pay, are preempted by federal statutes such as ERISA, such promises will go largely unenforced and the compensation of apparel employees will be further depressed. This will adversely affect the terms and conditions of employment of all employees in the apparel industries and make it more difficult to improve the factory conditions under which they labor.

Accordingly, International Ladies' Garment Workers' Union wishes to join in supporting the petition for review in this case which seeks to reverse decisions of courts of appeals which deprive states of jurisdiction to enforce direct contractual promises by employers to make severance and other payments to their employees.

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA ("UE") is a labor organization within the meaning of the National Labor Relations Act as amended, 29 U.S.C. Section

152(5) and an employee organization within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1002(4). It represents thousands of workers employed by employers engaged in heavy and light production in the electrical, radio, electronics and machine industries with respect to their wages, hours and other conditions of employment, including retirement income and welfare benefits. On behalf of these employees UE has entered into collective bargaining contracts with hundreds of employers throughout the country including General Electric Company and Westinghouse Electric Corporation.

The interest of UE in this case is both general and specific. Generally, it has an interest in the working conditions of all employees in the industries with which it is concerned whether or not they are organized and members of the Union. The denial of prac-

tical legal assistance afforded to unorganized workers by state agencies such as a Department of Labor, a consequence of the decision sought to be reviewed, is a matter of deep concern to UE.

Specifically, UE is directly interested in Equal Employment Opportunity Commission v. Westinghouse Electric Corporation, Civil No. #84-4799 (E.D. Pa.), wherein Westinghouse Electric Corporation has raised as a matter of defense that it is not obligated to pay severance pay to certain of its employees (including UE-represented individuals) because it is excused therefrom under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(2) on the ground that the severance pay arrangement is a bona fide employee benefit plan. Westinghouse Electric Corporation raises this defense notwithstanding a specific ruling in EEOC v. Westinghouse, 725 F.2d 211, 224-5 (3d Cir. 1983), an appeal

from a summary judgment in another case, that the severance plan is not a bona fide employee benefit plan.

The extent to which or whether the determination here sought to be reviewed by the Supreme Court may impinge upon the definition of a bona fide employee benefit plan in contexts apart from that of ERISA deeply concerns UE and may well affect the interests of the employees it represents.

THE LABOR EDUCATION AND RESEARCH PROJECT ("LERP") is a network of union activists and others with an interest in the labor movement, which informs its members about labor issues and facilitates an exchange of information about such subjects as organizing into unions, contracts, bargaining, and labor-management cooperation. LERP seeks to join in the brief submitted as amicus curiae on behalf of appel-

lants in this case because the Court's decision will have a substantial impact on all workers.

Specifically, if an employer's simple promise to pay benefits such as severance or sick pay is construed to constitute a "plan" within the meaning of ERISA and therefore to trigger pre-emption, the workers with whose interests the amici are concerned will find it more difficult to enforce their contracts with employers.

THE NATIONAL CONFERENCE OF BLACK LAWYERS (NCBL) is a nation-wide organization of attorneys committed to using their skills to eradicate the racism that continues to corrupt the political, economic, social and legal institutions of this country. NCBL is particularly concerned about the decision of the Second Circuit in Gilbert, et al. v. Burlington Industries because it exemplifies one of the ways in which apparently "color blind" rulings

contribute to the continuing and, indeed, increasing oppression of Black people. While ostensibly not a case about race or discrimination, Gilbert will have a disparate impact on Black workers, the vast majority of whom are still not represented by labor unions and, consequently, cannot rely on the National Labor Relations Act to enforce their contractual rights to severance pay.

The question of severance pay is also one which is of particular importance to NCBL because as a result of a history of racial discrimination in employment, Black workers are often the last hired and first fired. Once terminated, Black workers often face the problem of discrimination in securing new employment. The security of their right to severance pay is, therefore, an extremely important concern to Black workers, as is the ability to

use administrative mechanisms and state wage collection laws to recover benefits unjustly withheld.

NCBL therefore urges this Court to interpret each of the distinct provisions of ERISA as part of an integral scheme designed to increase worker security and require the fulfillment of promises to provide benefits. To do otherwise at this period in our history is to wink at a subtle but potent form of discrimination.

Introduction

Amici, representing collectively over half a million organized workers active in a wide variety of industries including manufacturing, communications, electronics, health care, textiles and agriculture, file this brief in support of plaintiffs-appellants and the State of New York in Gilbert et al. v. Burlington Industries, (hereinafter Gilbert) (S.Ct. Dkt. Nos. 85-441 and 85-460) because

amici believe the issues raised by this case and their resolution will have a substantial impact on labor unions and their members in a variety of ways detailed below. They seek, therefore, to protect and vindicate their own rights, and to fulfill the historic mission of organized labor to protect the rights of all workers, both organized and not-yet-organized.

They assert first, the importance of maintaining a clear focus on the purposes for which ERISA was enacted and the problems Congress sought to resolve through this statute. Secondly, they emphasize the unintentional but seriously damaging effect decisions such as that of the Second Circuit below and similar decisions in other circuits will have on the ability of labor unions to secure benefits for their members. Finally, amici urge this Court to consider the chilling effect of such decisions upon their right and ability to organize new workers into collective bargaining units.

1. The Parties

The parties to this action in many ways typify the antagonists that find themselves locked in some of the most difficult labor-management struggles today.

They represent, on the one hand, unorganized workers with no institution or agency to assert and protect their rights or give voice to their collective grievances, and, on the other, a large corporate entity whose profit margins are currently threatened by competition from imports from nations with significantly lower labor costs. Amici are acutely concerned about the larger question raised by the plaintiffs-appellants -- whether an employer can avoid severance pay obligations by contracting to, in effect, sell employees as well as machines and stock to another corporation. Amici urge this Court not to lose sight

of these realities while giving direction to lower courts lost in the toils of intricate statutory construction.

The plaintiffs in Gilbert are thirty-six unorganized workers who had been employed by Burlington Industries for varying periods of time, ranging from a minimum of seven years and seven months to thirty-three years (with an average of seventeen years). At the time they were severed from Burlington's payroll, on January 4, 1982, all were employed by its socks and hosiery division, which was sold as a going concern to "a large manufacturer". (Joint Appendix to Jurisdictional Statements at 22), (hereinafter referred to as "Joint Appendix").

At the time appellants were terminated by Burlington, the employer's severance pay policy was contained in two documents: (1) an employee handbook and (2) a policy manual that was made available, but not distributed, to

employees. Gilbert v. Burlington Industries, 765 F.2d 320, 323 (2d Cir. 1985). The policy provided that "employees who met certain requirements and were involuntarily terminated from the Company", 765 F.2d at 323, would receive severance pay based upon age and length of service, according to fixed rates. Employees terminated "due to circumstances such as elimination or modification of operations or other job eliminations due to bona fide organizational changes", Joint Appendix at 23, were entitled to severance pay. Appellants fall into that category.

2. The Procedural History

At this stage of the litigation the ultimate question of whether the Burlington employees are entitled to recover their severance pay is not yet ripe for resolution. On September 2, 1983, the New York State Department of Labor ordered the employer to fulfill

its severance pay obligations to its former employees under New York's Wage Collection Statute (New York Labor Law § 198-c). Enforcement of that order has been enjoined, however. Plaintiff-appellants come before this Court seeking resolution of the threshold question: were their benefits provided by means of a "plan" under ERISA (29 U.S.C. § 1001, et seq.) so as to preclude the application of state law? The answer given by this Court will determine whether millions of workers are entitled to direct remedies against their employers as well as recourse against their pension and welfare plans under ERISA.

Amici believe that this procedural history is telling. A large corporation has forestalled payment of benefits to a group of older workers who, during a four year period of double-digit inflation, have already lost significant value on their promised severance benefits, and have incurred the expenses of

two years of federal litigation. Amici cannot believe that those who drafted and enacted ERISA foresaw or intended that their efforts "to safeguard the well-being and security of working men and women", Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982), would be so distorted.

Argument

Amici do not seek to reargue the issue raised by plaintiff-appellants. Rather, they urge the Court to place the question presented and its answer squarely within the context of the Congressional intent and legislative history which inform ERISA as a whole. In order to do this properly, the Court must both analyze Congressional statements of purpose and review decisional law under ERISA, and frankly consider the realities of this litigation. Amici are persuaded that this Court will not approve a statutory construction of isolated

terms of the Act that will undermine and vitiate its purposes. This, unfortunately, is precisely the result of the approach urged by the defendant-appellee and adopted by the Court below.

While it appears elementary, amici cannot overstate the importance of construing the separate words and provisions of ERISA in light of and in order to effect the purposes for which the statute was enacted:

> ERISA, like the Civil Rights Act of 1871 and 1964, and the Labor-Management Reporting and Disclosure Act, is remedial legislation which should be liberally construed in favor of protecting participants in employee benefits plans.

Smith v. CMTA-IAM Pension Trust, 746 F.2d 587 (9th Cir. 1984) (emphasis added). And see, McDougall v. Donovan, 552 F. Supp. 1206, 1214 (N.D. Ill. 1982)("Each provision of ERISA must be interpreted in light of the Congressional intent underlying the Act.").

Prominent among the Congressional findings and declaration of policy accompanying the text of the statute is the specification of the purposes for which ERISA was enacted, including the protection of "the continued well-being and security of millions of employees and their dependents" and the "stability of employment and the successful development of industrial relations." 29 U.S.C. § 1001.

Congress therefore found that minimum standards must be established to regulate the operation of pension and welfare plans lest "employees and their beneficiaries [be] . . . deprived of anticipated benefits." Id. Three years after ERISA's enactment, the President recognized that "ERISA is an essential step in the protection of worker pension rights."1/ Message of the President, August 10, 1978, printed at 29 U.S.C.A. § 1001, at 53. So much of the statute's general purpose is almost in-

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1/ The statute was, of course, designed to protect rights to welfare benefits as well.

variably acknowledged, at least in passing. See, e.g., Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501 (9th Cir. 1985) ("ERISA is a remedial statute designed to protect the interests of employees in pension and welfare plans . . ."). The problem is that no court to date has given adequate consideration to what light this purpose casts upon the meaning of the word "plan", used as a term of art within the Act.

This Court has signalled the importance of resolving disputes concerning ERISA's scope and effect in numerous discussions of "the policy concerns behind ERISA." Central States, Southeast and Southwest Areas Pension Fund, et al. v. Central Transport, __ U.S. __, 53 L.W. 4811, 4813 (June 19, 1985). In Central States, the Court referred to its decision in Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980), wherein it recognized the underlying Congressional intent

"to correct this condition [i.e., insecurity of benefits] by making sure that if a worker has been promised a defined benefit upon retirement . . . he will actually receive it." 446 U.S. at 375, cited in Central States, 53 U.S.L.W. at 4814.

In Nachman, this Court referred to Senator Bensten's evocation of the "great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated." 446 U.S. at 374. The denial of welfare benefits to a large group of employees, while perhaps of smaller dimensions, also represents great personal tragedy, especially for the older worker terminated through no fault of his or her own, or the Black or other minority worker terminated because of plant reorganization and lack of seniority. Severance benefits, in such circumstances, may be provided by means of a "welfare benefit plan", 29 U.S.C. § 1002(1), which is "established and

maintained", id., within the meaning of ERISA, or directly by an employer as a form of deferred compensation, or both. ERISA was enacted to ensure that the security provided by benefit plans would not prove illusory. State remedies and the NLRA are intended to serve the same function with regard to direct employer liability.

Employers who argue that ERISA's remedial nature entitles them to a liberal construction of the term "plan" are simply wrong. The rule of lenity is to be applied in favor of the beneficiaries of remedial legislation, and not in favor of those who seek to escape its requirements.2/ It is not a rule of first re-

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2/ It is not an exaggeration to say that employers, as a rule, prevail under ERISA. In only one (Blau v. Del Monte, 748 F.2d 1348 (9th Cir. 1984)) of the sixteen cases collected in Appendix B of Appellant Gilbert's Jurisdictional Statement did employees' benefit claims prevail over employers' assertions that ERISA should be applied and that an "arbitrary and capricious" standard of review was appropriate. Two other employee claims survived motions for summary judgment

(footnote continued)

sort, but rather "comes into operation at the end of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." Callanan v. United States, 364 U.S. 587, 596 (1961) (footnote omitted).

Employers are equally wrong when they argue that ERISA frees them from direct liability under simple contracts with their employees. The legislative history is replete with evidence that ERISA was intended to displace the common law of trusts and replace it with a more comprehensive set of principles regarding the management of "employee benefit trusts." See, e.g., H. R. Rep. No. 93-533, reprinted in 1974 U.S. Code Cong. & Admin. News (hereinafter "USCCANS") 4643, 4650, 4651;

(footnote continued from previous page)
(Petrella v. NL Industries, Inc., 529 F. Supp. 1357, 1361 (D.N.J. 1982) and Russell v. Mass. Mutual Life Ins. Co., 722 F.2d 482, 485 (9th Cir. 1982) rev'd on other grounds, ___ U.S. ___, 53 U.S.L.W. 4938 (6/25/85)), but the vast majority were denied outright.

Sen. Rep. No. 93-127, reprinted in 1974 USCCANS 4841, 4865, 4869, 4881, 4882; Sen. Rep. No. 93-383, reprinted in 1974 USCCANS 4917; H. R. Rep. No. 93-1280, reprinted in 1974 USCCANS at pp. 5076, 5164; (Statement of Hon. Al Ullman), 1974 USCCANS at p. 5171; (Statement of Hon. Harrison A. Williams, Jr.), 1974 USCCANS at p. 5186.

There is not one iota of evidence, however, to support the position that ERISA was ever intended to abolish the common law of contracts as it applies to employer-employee relations, or to displace state administrative remedies that have long been available under wage collection statutes. Surely, if this had been one of Congress' objectives, it would have left something more than "clanging silence" as evidence of its intent. Sedima, S.P.R.L. v. Imrex, et al., ___ U.S. ___, 53 L.W. 5034, 5038 n. 23 (July 1, 1985).

Absent a clear indication by Congress that it intended to eradicate the law of direct employer liability on contract, one can hardly countenance a construction of the Act which accomplishes such a result.

Thus, as it did in Nachman, a careful study of ERISA's legislative history and purpose should once again guide the Court to reject an interpretation of the statute which limits rather than enhances the ability of employees to recover promised benefits and permits employers to escape liability, whether directly to their employees or indirectly to employee plans.

This Court simply cannot be blind to the identity of the parties most persistently invoking ERISA for purposes quite contrary to the Congressional intent "to safeguard the well-being and security of working men and women", Donovan v. Dillingham, supra at 1372. Increasingly, these parties include major em-

ployers such as Gulf Oil [Scott v. Gulf Oil Corp., supra -- severance pay denied], Del Monte Corporation [Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984) -- employer sought to escape liability for "secret" severance pay obligation], Delta Airlines [Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1982) -- employer sought to escape duty of non-discrimination imposed by Title VII], Westinghouse Corporation [E.E.O.C. v. Westinghouse, 725 F.2d 211 (3d Cir. 1983), cert. denied, ___ U.S. ___, 105 S.Ct. 92 (1984) -- employer defended against an age discrimination claim by asserting alleged discriminatory action constituted a bona fide benefit plan under ERISA], Marcal Paper Mills [Marcal Paper Mills, Inc. v. Ewing, Civ. No. 83-0274-B, (D. Maine August 27, 1985) -- employer sought to escape obligations under plant closing statute], and a host of others. The most dramatic evidence of employer action to divert

ERISA from its intended purposes may be found in the style of a single Ninth Circuit case brought by the California Hospital Association, the California Restaurant Association, the California Manufacturers' Association, the Merchants and Manufacturers' Association, the California Hotel and Motel Association, and the California Chamber of Commerce. Thus arrayed, these employers' associations joined together to sue California's Commissioner of Labor and to obtain an injunction prohibiting enforcement of their obligations to provide vacation pay on an accrued per diem basis. They argued that all such obligations were enforceable solely by way of ERISA. California Association of Hospitals, etc. v. Henning, Commissioner of Labor, Civ. Nos. 83-6381, 83-6416 (9th Cir. September 6, 1985).

The spectacle of major employers and employers' associations pretending to champion ERISA's ability to protect workers should be

treated with all the skepticism due a fox's protestations of expertise in the field of chicken-watching.

Employers, envious of ERISA's vast powers, seek both to ignore its mandates and evade its responsibilities while distorting the meaning of its terms. While Burlington's failure to file the documents required by ERISA should not relieve it of any duties the statute imposes upon any bona fide plan it may maintain, amici believe that this failure reveals its determination to avoid any and all liability for benefits, however provided.3/

3/ Burlington filed none of the documents required by ERISA between 1974 and 1983. The documents then filed reflect a hasty decision to appear to comply with ERISA once its "protections" were sought. To characterize its action as compliance with even the minimal reporting and disclosure provisions of ERISA which apply to welfare benefit plans is to exalt form over substance. Information responsive to virtually every question was refused as "not applicable".

This Court can and must restore ERISA to its original intent: safeguarding the integrity and viability of employee benefit plans. This task can only be accomplished by insisting that each term of the statute be read in light of that purpose. Thus construed, it is clear that ERISA may not be used as the defendant-appellee desires -- as a shield by employers against direct contractual liability to their employees.

It is no answer that the employees in Gilbert have not yet lost their claims under ERISA. They have been deprived of benefits due over three years ago; they have been denied the right to enforce an order awarding them those benefits; and they have been forced to bear the additional expense and uncertainty of litigation. Once the case returns to the district court on the merits, the employer will surely argue that they must prove not only the existence of an obligation to provide

benefits and a failure to fulfill that obligation, but also that the denial of benefits was "arbitrary and capricious." See, Slack v. Burlington Industries, Civ. No. 83-274-G (4th Cir. Oct. 17, 1985), a companion case to Gilbert, in which the Fourth Circuit judged Burlington's denial of benefits under an "arbitrary and capricious" standard and found no liability for severance benefits.4/

Amici certainly recognize that ERISA does not guarantee that every employee will receive every benefit available to employees generally. What it does attempt to guarantee is fairness in the administration of benefit-providing mechanisms in order to enhance the security of the workforce. To adopt the construction proposed by Burlington converts ERISA into a device for creating insecurity

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4/ Amici understand that the employees in Slack will seek review in this Court on several grounds, including the importation of the "arbitrary and capricious" standard from trust law into the field of employee benefit mechanisms not established or operated as trusts.

among workers. Not only does it undermine the certainty that they will receive benefits due by taking away direct employer liability under state statutes and common law, but it makes their receipt of benefits at all subject to the total discretion of an employer acting solely in its own best interest.5/

The interests of all working people, organized and not-yet-organized, are seriously damaged by any device that makes their ability to collect benefits contingent upon employer discretion. This is doubly so in the case of workers participating in organizing campaigns prior to formal union affiliation and certification. The mere knowledge that benefits are contingent upon an employer's discretion will have a substantial chilling effect on the abi-

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5/ ERISA contemplates the establishment of a separate entity operated according to the fiduciary standards imposed by the federal common law of trusts developed under ERISA. It does not contemplate giving employers who control the payment of benefits through an automatic payroll practice the benefit of the "arbitrary and capricious" standard.

lity of workers to fully associate with representatives of organized labor according to the mandates and policy of the NLRA.

CONCLUSION

For all the foregoing reasons, the questions presented by the appeals in Roberts v. Burlington Industries, Inc. and Gilbert, et al. v. Burlington Industries, Inc. should be given plenary consideration.

Respectfully submitted,

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